No. 18-462

IN THE
Supreme Court of the United States

BOBBIE AND DON GUNDERSON,
Petitioners,
v.

STATE OF INDIANA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, within its boundaries, the State of Indiana owns the bed of Lake Michigan in public trust up to a point higher than the water's edge at any given moment.

TABLE OF CONTENTS

TABLE OF AUTORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

STATUTES AND ORDINANCES

REGULATIONS

RULES

OTHER AUTHORITIES

INTRODUCTION

In the decision below, the Indiana Supreme Court reached the unremarkable conclusion that, when it became a State, Indiana took public trust title to the bed of Lake Michigan up to the ordinary high water mark (OHWM), as defined by a centuries-old common law test endorsed by this Court. It also said that, while other States regulate their public trust holdings by observing a state law division between jus publicum title (*i.e.,* public trust title, which the State may not alienate) and jus privatum title (*i.e.*, proprietary title, which the State may alienate), Indiana does not do so.

Petitioners dramatize these holdings as presenting some great unresolved question over exactly what Congress granted newly created Great Lakes States when they entered the Union. The reality is much more mundane, for no equal-footing Great Lakes State has defined its grant in contrary terms, and the only two that limit their jus publicum rights at a point other than the OHWM do so based on state law, not federal law. In any event, Petitioners sold their lakefront property years ago and stand to gain nothing from review by this Court, which creates substantial doubt as to the Court's jurisdiction even to hear the matter. Untangling that threshold issue only to confront quintessential state-law questions over public trust rights—respecting which there is no real underlying federal-law disagreement—is simply not worth the Court's time and attention.

STATEMENT OF THE CASE

In 2010, the Town of Long Beach, Indiana, which is situated on the shore of Lake Michigan between Michigan City and the Michigan state line, passed an ordinance adopting the Indiana Department of Natural Resources' administrative boundary, "which separates state-owned beaches from private, upland portions of the shore." Pet. App. 4 (citing Long Beach, Ind., Code of Ordinances § 34.30 (amended 2012); 312 Ind. Admin. Code 1-1-26(2) (2017)). That ordinance not only recognized the State's ownership of the beach as public trust land, but also resolved that Long Beach's police department would not enforce private property ordinances below Lake Michigan's OHWM. *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1080–81 (Ind. Ct. App. 2015).

This exercise in local policing upset lakefront landowners, including Petitioners Bobbie Jo and Donald Gunderson, who inferred that the general public would have unfettered access to the Lake Michigan beach for purposes of strolling, sunbathing, picnicking, etc. The Gundersons decided to take the issue to court, ultimately by asserting state law quiet-title and declaratory-judgment claims against the State of Indiana and its Department of Natural Resources in Laporte Superior Court. Appellant's App., Vol. 1 at 37–38. Before the trial court issued its final judgment, the Gundersons split the property into two parcels and sold the parcels to a developer, So Dun, LLC.[1] The

[1] The parcel ID numbers for these properties are: 46-01-15-428.008.000-023 (Parcel 008) and 46-01-15-426-013.000-023

Gundersons, however, did not alert the trial court or the State to that change of ownership.

Continuing to litigate the case even though they no longer owned lakeshore property, the Gundersons argued that determining ownership of their property is "a matter of state law, not federal law, and not governed by the equal footing doctrine or public trust doctrines." Appellant's App., Vol. 1 at 95 (footnote omitted). They claimed full title up to the water's edge of Lake Michigan. Appellant's App., Vol. 1 at 97. The trial court held that under the public trust and equal footing doctrines, Indiana obtained title to all land along Lake Michigan below the OHWM, Pet. App. at 81, as governed by state regulations, which declare an OHWM at 581.5 feet International Great Lakes Datum, *i.e.*, above the water's edge. Pet. App. at 83–84. Thus, any land below the OHWM is encumbered with public trust rights. Pet. App. at 83–84.

The Indiana Court of Appeals affirmed that "a state holds the title to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people." Pet. App. 53. It also said, however, that Indiana's original equal footing grant of public trust land went up to the "common law OHWM," not the regulatory OHWM embraced by the trial court. Pet. App. 60. Finally, it concluded that, as a matter of state law, the Gundersons shared title to the shore (with the State) down to the water's edge, despite the lack of any conveyance of jus privatum

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(Parcel 013). Supplemental App. in Supp. of Appellant's Resp. to Writ in Aid of Appellate Jurisdiction, Vol. 2 at 119.

rights to that portion of the shore by the State. Pet. App. 61–63.

All parties sought discretionary review by the Indiana Supreme Court, with the Gundersons and the State seeking mutually exclusive title between the OHWM and the water's edge, and the various intervenors arguing against a regulatory definition of OHWM. The Indiana Supreme Court rejected the argument "that the water's edge is the legal boundary separating public trust lands from private property" and ruled that the State maintained exclusive public-trust ownership of the shore up to the OHWM. Pet. App. 18. Like the Court of Appeals, however, it said that courts must determine the line by state statutes and common law, not regulatory directive (though Indiana's Department of Natural Resources could determine its regulatory jurisdiction via such regulatory high water mark). App. 32–35.

The Indiana Supreme Court explained that "variations in characterizing equal-footing lands are simply alternative expressions of the same rule of law: lands on the waterbody side of the OHWM pass to new states as an incident of sovereignty, whereas lands on the upland side of the OHWM are available for federal patent and private ownership." Pet. App. 18. Further, "early American common law" did not define the OHWM as being located at the water's edge, but instead "defined that boundary as the point 'where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.'" Pet. App. 20 (quoting *Howard v. Ingersoll*,

54 U.S. (12 How.) 381, 427 (1851) (Curtis, J., concurring).

Finally, while the State contended that the March 2015 sale of the property rendered the case moot, the Indiana Supreme Court concluded that it could decide the case regardless, owing to a state law "public interest exception" to mootness doctrine. Pet. App. 8 n.3. Sometime in recent months, the property at issue in this case changed hands yet again, and is now owned by individuals who are not parties to this case and who have never expressed any interest in maintaining this lawsuit. *See* Beacon, LaPorte County, Indiana, https://beacon.schneidercorp.com/?site=LaPorteCountyIN (Search full parcel ID in "Property Search").

REASONS TO DENY THE PETITION

I. The Gundersons—the Only Petitioners Before this Court—Lack Article III Standing Because They Long Ago Sold Their Lakefront Property

The Court lacks jurisdiction to hear this case because the Gundersons sold their lakefront property, Supplemental App. in Supp. of Appellant's Resp. to Writ in Aid of Appellate Jurisdiction, Vol. 2 at 115; therefore, the case is moot.

This is a quiet-title action, which is to say it is a claim brought by purported landowners seeking a declaration by a court that they, and no one else, hold title in the subject property. *See Cent. Fed. Sav. & Loan Ass'n v. Cummings*, 25 N.E.2d 638, 639 (Ind.

1940) ("The statute providing for an action to quiet title was intended to secure repose and to settle in one comprehensive action all conflicting claims; and a decree in an action to quiet title, as well as in kindred actions where the title is in issue, cuts off all claims of the unsuccessful party which are not saved by the decree."). It is not a claim brought on behalf of the property itself.

The basis for the Gundersons' claim to exclusive title to lake bed above the water's edge of Lake Michigan was their undisputed ownership of Parcels 008 and 013. Having sold the property, however, the Gundersons have released any plausible personal claim to exclusive title to land above the water's edge of Lake Michigan. And while purchasers of the former Gunderson property may have such a claim, the Gundersons have no authority to assert their rights—an accountability problem all the more apparent because title to the property has now changed hands multiple times.

For the Court to have jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). Consequently, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during the litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72. The Gundersons' sale of the property is an intervening circumstance depriving the Court of Article III jurisdiction to consider the case.

The Gundersons argue that the Court retains jurisdiction under Federal Rule of Civil Procedure 25(c) and its Indiana equivalent, which provide that "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c); Ind. R. Trial P. 25(C). Federal Rule 25(c), however, does not apply here. And neither it nor its Indiana analogue "change[s] the constitutional requirement that an actual case or controversy must exist throughout a lawsuit." *Reibman v. Renesas Electronics America, Inc.*, 2014 WL 251955 at *7 (N.D. Cal. 2014) (citing *Trend Micro Corp. v. Whitecell Software, Inc.*, 2010 WL 4722504 at *3 (N.D. Cal. 2010) (*Trend Micro I*)). "Certain events—such as a transfer of interest—can divest the court of subject matter jurisdiction because the named party no longer holds an interest in the lawsuit." *Id.*

Rule 25(c) is "procedural," *Trend Micro I*, 2010 WL 4722504 at *3, and the 1937 Advisory Committee that drafted the original Federal Rules of Civil Procedure stated that Rule 25(c) was "a combination and adaptation" of two *state* laws from that time: New York Civil Practice Act § 83 and California Code of Civil Procedure § 385. *Report of the Advisory Committee on Rules for Civil Procedure*, 65 (Apr. 1937). Conceptually, therefore, it did not originate in a procedural context designed to take account of Article III standing and mootness limitations. Accordingly, it is far from clear that Rule 25(c) (or more precisely in this case, Indiana Trial Rule 25(C)) can apply in all cases consistent with those limitations.

In practice, Rule 25(c) operates as a "procedural mechanism by which a party may bring a motion to substitute a non-party successor to an interest that is the subject of a suit." *Reibman*, 2014 WL 251955 at *6. Critically, owing to its procedural nature, "Rule 25 does not substantively determine what actions survive the transfer of an interest." *Citibank v. Grupo Cupey, Inc.*, 382 F.3d 29, 32 (1st Cir. 2004) (citing *ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186, 191 (8th Cir. 1995)). The Rule merely "enables the court to continue the action with the assignee joined with or in the place of the original party." *General Battery Corp. v. Globe-Union, Inc.*, 100 F.R.D. 258, 262–63 (D. Del. 1982).

In terms of practical utility, Rule 25(c) is most often invoked in insurance subrogation, corporate mergers and acquisitions, and patent litigation contexts so that an action need not be dismissed when a party transfers its interest to a closely related non-party. *See, e.g.*, *ELCA Enters., Inc.*, 53 F.3d at 191 (mergers and acquisitions); *Hilbrands v. Far East Trading Co., Inc.*, 509 F.2d 1321 (9th Cir. 1975) (insurance subrogation); *General Battery Corp*, 100 F.R.D. at 263 (mergers and acquisitions and patent litigation); *Reibman,* 2014 WL 251955 at *8 (N.D. Cal. 2014) (patent litigation); *Trend Micro I*, 2010 WL 4722504 at *3 (patent litigation).

When, however, a party transfers its interest to persons wholly unrelated to the litigation with no Rule 25(c) motion to substitute, Article III requires dismissal. *Trend Micro I*, 2010 WL 4722504 at *1–*2; *Trend Micro Corp. v. Whitecell Software, Inc.*, 2011 WL 499951 at *5–*6 (N.D. Cal. 2011) (*Trend Micro II*)

(rejecting the argument that Rule 25(c) obviates Article III standing requirements and holding that defendant's sale of patent to unrelated entity foreclosed continued litigation of infringement action against it); *accord E.J. Breneman, LP v. Road Science LLC*, 2012 WL 406346 at *2–*4 (E.D. Penn. 2012) (dismissing patent declaratory judgment action for want of subject matter jurisdiction because patent at issue was sold to an unrelated non-party); *Reibman*, 2014 WL 251955 at *10 (dismissing entire action because no case or controversy present between named parties or substituted parties).

The State has found no Rule 25(c) authority permitting a case to proceed in the name of individual owners of real property after they have sold their interest to an un-affiliated entity in an arms-length transaction. The current owners of Parcel 008 and Parcel 013 are not wholly-owned subsidiaries, insurers, or even friends of the Gundersons (so far as is known to the State). Instead, the Gundersons wish to litigate the property rights of *wholly unrelated* persons, and to do so with no evidence in the record suggesting that the current owners even *desire* this litigation of their rights.

Furthermore, the Gundersons erroneously proceed as if Indiana Rule 25(C) is self-executing in a way that automatically entitles them to continue litigating this case. Yet Indiana Trial Rule 25(C) says only that an action "*may* be continued" upon transfer of interest, which suggests a trial judge must exercise discretion based on the nature of the case and the relief sought. Indeed, the few cases that have addressed the interplay between Federal Rule 25(c) and Article III

standing demonstrate that trial court involvement and fact-finding is critical to the operation of the Rule. *See ELCA Enterprises, Inc.*, 53 F.3d at 191–92 (remanding with orders to allow substitution that had previously been denied); *Hilbrands*, 509 F.2d at 1323 (remanding to allow a Rule 25(c) motion). Here, however, the Gundersons did not even notify the trial court as to the transfer of interest so as to give that court an opportunity to decide whether to dismiss the case.

For its part, the Indiana Supreme Court acknowledged the mootness issue created by the Gundersons' sale of the lakefront property, but decided the case anyway only because the case involved a "question[] of great public interest." Pet. App. 8 n.3. It did *not* proceed as a function of Indiana Trial Rule 25(C). Accordingly, no state court has determined that Indiana Rule 25(C) applies, and it would be inappropriate for this Court to interpret and apply that state procedural rule in the first instance .

Finally, the Court may not depend for its own jurisdiction on the relaxed mootness doctrine employed by the Indiana Supreme Court. Indeed, when cases arrive from a state court, the Court is especially vigilant to ensure Article III jurisdiction, precisely because state courts do not necessarily adhere to rigorous federal jurisdictional standards. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' . . . the fact remains that under Art. III '(e)ven in cases arising in the state courts, the question of

mootness is a federal one which a federal court must resolve before it assumes jurisdiction.'" (internal citations omitted)). When the parties to a state court dispute lack Article III adverseness, the Court has been willing to find the existence of federal jurisdiction only where the resulting state court judgment itself created an Article III injury against the party seeking certiorari (*i.e.,* the defendant). *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989) (granting state court defendant's cert petition notwithstanding parties' original lack of sufficient adverseness because the state court judgment enjoined the defendants from enforcing a state statute).

Here, the result of state court litigation is a judgment in favor of defendants rejecting a quiet-title claim—and no injunction or damages awarded against anyone. As former owners, the Gundersons plainly are unharmed by that judgment. Accordingly, because petitioners sold the subject property years ago, it is far from certain the Court has jurisdiction to reach the question presented, which makes this case an exceedingly poor candidate for certiorari.

II. No Lower-Court Dispute or Unresolved Issues Exist over the Limits of Each State's Equal Footing Grant, the Public Trust Doctrine, or Any Other Relevant Federal Law

In remarkably skimpy fashion, the Gundersons contend that Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin employ differing interpretations of the Equal Footing Doctrine and urge review because the supposed resulting "confusion" over public trust rights on the Great Lakes "is not simply a matter of diverging state laws." Pet. for Writ of Cert. 23. But the cases they cite, and the circumstances in which those decisions were rendered, belie that assertion. Once a State obtains title to public trust land under federal law, any question regarding "the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states." *Shively v. Bowlby*, 152 U.S. 1, 40 (1894). And because each State has dealt with public trust lands "according to its own views of justice and policy . . . [g]reat caution . . . is necessary in applying precedents in one state to cases arising in another." *Id.* at 26. In short, to the extent the equal-footing States differ in how they afford public access to Great Lakes beaches, those differences are traceable to state law, not federal law.

A. The decision below did not award all Lake Michigan beachfront to the State

First, the Gundersons claim, hyperbolically, that the Indiana Supreme Court held that public trust land extends to "all the sandy or pebbly areas on Great Lakes beaches." Pet. 24. That characterization

is not supported by the actual language of the decision below.

The Indiana Supreme Court held only that "Indiana at statehood acquired equal-footing lands inclusive of the temporarily exposed shores of Lake Michigan up to the natural OHWM." Pet. App. 21. It rejected the Gundersons' contention that the OHWM stood "at the water's edge" because "early American common law defined" the OHWM "as the point 'where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.'" Pet. App. 20 (quoting *Howard v. Ingersoll*, 54 U.S. (12 How.) 381, 427 (1851) (Curtis, J., concurring)). Instead, the common-law definition of OHWM included consideration of the "line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics," including any "clear and natural line impressed on the bank," as well as shelving, changes in the soil's character, the absence of terrestrial vegetation, or the "presence of litter or debris." Pet. App. 30.

The Gundersons insist that this Court's intervention is necessary because "the decision below pushes the equal-footing boundary much farther inland than common law principles support." Pet. for Writ of Cert. 26. But Indiana's definition of the OHWM comports with the definition of OHWM used by the majority of the Great Lakes' States, the Army Corps of Engineers, *see* Part II.C, *infra*, and this Court's thorough analysis of riparian boundaries in *Howard v. Ingersoll*.

In any event, the precise location of the OHWM at any given point along Indiana's Lake Michigan shoreline has yet to be determined, so any assertion about the supposed breadth of Indiana's jus publicum title is premature and even misleading.

B. The Court has already held that, with respect to non-tidal navigable waters—rivers and lakes alike—OHWM means something other than the instant water's edge

Second, the Indiana Supreme Court's decision is supported by the Court's precedents, which have long established that public trust land encompasses both the land underneath non-tidal navigable waterways (including lakes) and their shores.

When the public trust doctrine was first incorporated into American jurisprudence in 1842, it applied only to tidal bodies of water because that was the law of England, but by "the late 19th century, the Court had recognized 'the now prevailing doctrine' of state sovereign 'title in the soil of rivers really navigable.'" *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012) (quoting *Shively*, 152 U.S. at 31). This Court first extended the public trust doctrine to non-tidal navigable waters in *Barney v. Keokuk,* over 30 years after the public trust doctrine was first adopted. 94 U.S. 324, 338 (1876). The Court expanded the public trust doctrine because it altered the definition of "navigable waterways" in admiralty jurisdiction to include—not incidentally—the Great Lakes.

In *The Genesee Chief,* the Court ruled that admiralty jurisdiction included the Great Lakes. 53 U.S.

443, 453 (1851). The Great Lakes "are in truth inland seas," *id.*, and "every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes." *Id.* "The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." *Id.* at 457.

Thirty years later, in *Barney v. City of Keokuk*, the Court invoked *The Genessee Chief* to extend public trust doctrine to non-tidal navigable waterways. 94 U.S. at 338. *Barney* acknowledged that early public trust cases such as *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), *Pollard v. Hagan*, 44 U.S. 212 (1845), and *Goodtitle ex dem. Pollard v. Kibbe*, 50 U.S. 471 (1850), "related to tide-water," but held that "they enunciate principles which are equally applicable to *all navigable waters*." *Id.* at 338 (emphasis added). The Court explained that since *The Genesee Chief* declared that "the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are . . . entitled to the denomination of navigable waters" that circumstance left "no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters." *Id.* at 338. Accordingly, "the proprietorship of the beds and shores of such waters"—*i.e.* the Great Lakes and rivers alike—"properly belongs to the States by their inherent sovereignty." *Id. See also Hardin v. Jordan*, 140 U.S. 371, 382 (1891) (stating that the public trust doctrine "has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers"). The Gundersons themselves

acknowledge that *Barney*'s expansion of public trust doctrine applied to both the Great Lakes and other navigable waterways, such as rivers. Pet. 6.

The Court in *Barney*, furthermore, carried forward (again, to all non-tidal navigable waterways) the traditional understanding of the OHWM boundary, *i.e.*, that "the proprietorship of the *beds and shores* of such waters . . . properly belongs to the States" and that the United States "wisely abstained from extending (if it could extend) its survey and grants *beyond the limits of high water*." 94 U.S. at 338 (emphasis added). In *Shively v. Bowlby*, the Court confirmed the point: "title and rights of *riparian or littoral* proprietors in the soil *below high-water mark* . . . are governed by the laws of the several states . . . ." 152 U.S. 1, 57–58 (1894) (emphasis added); *see also id.* at 58 (any federal land grants "bordering on or bounded by navigable waters, convey, of their own force, no title or right *below high-water mark*, and do not impair the title and dominion of the future state, when created . . . ." (emphasis added)).

The precise, commonly used meaning of the OHWM—and that used by the Indiana Supreme Court in this case—also has its roots in this Court's decisions. In *Howard v. Ingersoll*, where it addressed the limits of Georgia's retained riverbed holdings after it ceded lands to the United States, the Court said that the line dividing the bed and banks of a non-tidal river was "those boundaries . . . which contain their waters at their highest flow" and that "where the bank is fairly marked by the water, that water level will show at all places where the line is." 54 U.S. 381, 415, 419 (1851). Justice Curtis, however, supplied a

more specific definition, namely that the "line dividing the bed from the banks" was where the "presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself." *Id.* at 427 (Curtis, J., concurring).

While *Ingersoll* was not a public-trust-doctrine case, Justice Curtis's articulation of the non-tidal OHWM has become, as the Gundersons themselves acknowledge, the common law formulation "widely adopted" in public trust cases (indeed, the Gundersons identify no others). Pet. 11. *See also* Anthony Dan Tarlock and Jason Anthony Robison, *Law of Water Rights and Resources*, Riparian land—Location of water boundaries—Boundaries of non-tidal navigable waters, § 3:36 (noting that "[m]odern tests are derived from [this] early Supreme Court decision."). As set forth in more detail below, the four equal-footing Great Lakes States that use OHWM as the jus publicum boundary all apply a variation of Justice Curtis's test.

In short, this Court has already provided sufficient guidance as to the relationship between Great Lakes States' equal footing grants and the limits of jus publicum title. Its precedents have established that the public trust doctrine, while originating with tidal waters, extends on the same terms to non-tidal waterways (including the Great Lakes). Those precedents also have provided the basis for a widely used non-tidal OHWM test. Ultimately, as discussed below, the

equal-footing Great Lakes States have, in implementing the Court's precedents, arrived at fully consonant understandings of the federal limits of jus publicum title.

C. Regarding federal law, the decision below is fully consonant with other equal-footing States' Great Lakes OHWM/public trust determinations

Of the six equal-footing Great Lakes States, four—Indiana, Michigan, Minnesota, and Wisconsin—control public trust rights up to the OHWM of navigable lakes, *not* merely to the water's edge at any given moment. In fact, all four use some version of Justice Curtis's OHWM test. The remaining two—Illinois and Ohio—established public trust boundaries as matters of state law before *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876), and have never revisited the issue, which of course is their prerogative.

1. While the Indiana Supreme Court held that the State holds both jus publicum and jus privatum title to the shore of Lake Michigan up to the OHWM, three other equal-footing Great Lakes States (Michigan, Minnesota and Wisconsin) have permitted littoral property owners to share title to the shoreline with the State. Variations in state decisions whether and how to divide jus publicum and jus privatum title, however, are not significant, for "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). All that matters for present purposes is that in each of those States and Indiana, the State's

jus publicum title extends beyond the instant waterline to a point adjudged according to Justice Curtis's *Ingersoll* standard. In other words, these States follow a consistent understanding of the scope of public trust title with respect to their equal footing grants.

To begin, Wisconsin maintains that upon statehood, it "obtained absolute title to the beds of navigable waters like Lake Superior" and that "the land below the OHWM is held in trust for the public." *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987). Furthermore, Wisconsin holds that the OHWM is not the waterline, but "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Id.* at 342 (quoting *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (1914)).

Michigan follows a similar course. In *Glass v. Goeckel*, the Michigan Supreme Court affirmed that "Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust." 703 N.W.2d 58, 69 (Mich. 2005). Although the Great Lakes are not impacted by the tide, water levels on the lakes do "change because of precipitation, barometric pressure, and other forces." *Id.* at 71. Fluctuations in water level cause "temporary exposure of land that may then remain exposed above where water currently lies." *Id.* "This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point." *Id.*

That said, "the public trust doctrine preserves public rights separate from a landowner's fee title," such that "the boundary of the public trust need not equate with the boundary of a landowner's littoral title." *Id.* at 70. Accordingly, "a landowner's littoral title might extend past the boundary of the public trust" and "the jus privatum and the jus publicum may overlap." *Id.* Regardless, Michigan adopted, for purposes of determining jus publicum limits, the same OHWM definition as Wisconsin—the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark.

Like Michigan, Minnesota recognizes public trust rights up to the OHWM even as it also recognizes littoral owners' jus privatum rights—"a matter for each state to determine for itself"—to the water's edge. *State v. Korrer*, 148 N.W. 617, 623 (Minn. 1914), *supplemented*, 127 Minn. 60, 148 N.W. 1095 (1914). In other words, a littoral landowner's "title is not absolute except to ordinary high-water mark" and "in the intervening space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose." *Id.* at 623. And as the notion of "intervening space" implies, Minnesota defines the OHWM as a point higher than the instant water's edge, namely the point where the "presence and action of the water are so common and usual, and so long-continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself." *Mitchell v. City of St. Paul*, 31 N.W.2d 46, 49 (Minn. 1948).

Finally, the definition of the OHWM employed by these equal-footing Great Lakes States are not only in accord with one another, but are also in accord with the definition employed by the Army Corps of Engineers. The Corps, for purposes of defining its regulatory jurisdiction under the Clean Water Act, defines the OHWM *not* as the water's edge at any given moment, but as a point higher on the shore. Indeed, it uses essentially the same standard as that articulated by Justice Curtis in *Ingersoll*, *i.e.*, a mark on the shore established "by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3.

2. Illinois and Ohio treat public trust boundaries differently, but only because they established those boundaries as matters of state law either before, or without reference to, the Court's decision in *Barney*. Critically, Illinois and Ohio have never seen fit to reexamine whether, in light of *Barney*, their equal footing grants would permit jus publicum title on the same terms as those embraced by the other equal-footing Great Lakes States. Regardless, judicial precedents from those States do not imply any particular understanding of the scope of equal footing title, let alone one that differs from the other equal-footing Great Lakes States.

Before *Barney*, the boundary between riparian property and non-tidal navigable waterways, such as the Great Lakes, was an open question. During that

era, Illinois held—as a matter of state law—that the boundary of private property along Lake Michigan was not the high water mark, but "the line at which the water usually stands, when free from disturbing causes…." *Seaman v. Smith*, 24 Ill. 521, 524–25 (1860). In *Fuller v. Shedd*, 44 N.E. 286, 296 (1896*), aff'd sub nom. Hardin v. Shedd*, 52 N.E. 380 (1898), *aff'd*, 190 U.S. 508 (1903), the Illinois Supreme Court observed that rights "to land bounded on a meandered lake" "must be resolved by the law of Illinois" and relied on *Seaman* to establish Illinois law regarding riparian boundaries.

Ohio, in turn, relied on *Seaman* (without even considering *Barney*) to hold that "the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes." *Sloan v. Biemiller*, 34 Ohio St. 492, 492, 513 (1878). *Sloan* makes clear that this issue is a matter of state common law and can vary from State to State. *Id.* at 511–12. More recently, in *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 955 N.E.2d 935, 947 (Ohio 2011), the Ohio Supreme Court explained that the Ohio legislature had "clarified the public policy of the state of Ohio" by codifying *Sloan*. Like Illinois, Ohio relies solely on state law to determine the limits of jus publicum rights, and its judicial decisions do not imply any particular understanding of the federal equal-footing grant.

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The boundaries of jus publicum and jus privatum title in public trust land is a quintessential state law matter. The only federal question the Gundersons

raise has to do with antecedent boundaries of Great Lakes States' equal footing grants. But those States have not reached confused or conflicting understandings of those grants—even if their respective state-law jus publicum/jus privatum outcomes do happen to differ in some particulars. Intervention by the Court here could only interfere with Indiana's legitimate state law determinations without resolving any actual lower-court federal law disagreements.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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